BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRYAN W. THRASH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,052,594
RACEWAY AUTO GROUP, INC.	)	
Respondent	)	
AND	)	
	)	
RIVERPORT INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the March 31, 2011, Preliminary Decision entered by Administrative Law Judge (ALJ) Marcia L. Yates Roberts.

ISSUES

At preliminary hearing, claimant sought temporary total disability payments commencing August 27, 2010, and medical treatment with Dr. George G. Robinson, II. Claimant alleges he stepped in a hole and injured his right ankle on August 17, 2010, while working for respondent. Respondent asserts that claimant had a pre-existing right ankle condition and the medical reports at the University of Kansas Medical Center and Truman Medical Center make no reference to claimant suffering a work-related injury. Dr. Robinson indicated claimant had a pre-existing condition.

The ALJ appointed Dr. Greg Horton to provide a second medical opinion concerning claimant's right ankle and foot. If Dr. Horton was unavailable, then claimant's attorney is to provide the ALJ with a list of three qualified foot/ankle orthopedic surgeons for the examination. In her preliminary order, the ALJ did not state why she was sending claimant to Dr. Horton for an independent medical evaluation (IME). However, in the preliminary order, the ALJ quoted Dr. Robinson concerning the difficulty of determining causation of claimant's injury. The ALJ made no finding that claimant suffered a personal injury by accident that arose out of and in the course of his employment. Further, the ALJ held in abeyance claimant's request for temporary total disability payments until after she receives the IME report. Therefore, this Board Member believes the ALJ ordered the IME to assist her in determining causation.

In its brief respondent indicated the Board has jurisdiction to hear this matter. Claimant's attorney did not address the issue of jurisdiction in its brief. The Board generally does not have jurisdiction to review a preliminary order requiring the claimant to undergo an IME. The Board's review of preliminary hearing orders is limited. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[1] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[2]

Claimant testified the accident occurred on August 17, 2010, give or take two days. In the Preliminary Decision the ALJ found claimant has met the statutory notice requirement, but did not make a finding as to the specific date of accident or date notice was given. The ALJ found that just cause existed to extend statutory notice to 75 days under K.S.A. 44-520. Claimant alleges he informed respondent of the accident on the same day it occurred. Respondent denies any knowledge of the alleged accident until the day it received a letter from claimant's attorney alleging claimant suffered a work-related injury on August 17, 2010. The letter was never made part of the record, and there was no testimony indicating the date respondent received the letter.

1. Does the Board have jurisdiction to review the ALJ's order requiring claimant to undergo an IME?

2. If the Board finds it has jurisdiction, did the claimant suffer a personal injury by accident that arose out of and in the course of his employment?

3. Did claimant give timely notice?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant worked as an auto detailer for respondent, a car dealer, from March 2010 until August 26, 2010, or September 2, 2010. While employed for respondent, claimant delivered vehicles to auto auctions, picked up vehicles and cleaned vehicles for the car lot. Claimant is 40 years of age and is currently unemployed.

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[1] K.S.A. 2010 Supp. 44-551.

[2] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

Claimant believes he was injured on August 17, 2010, but concedes it could have been two days earlier or two days later. On the date claimant was injured, he removed a driver's window from a wrecked Monte Carlo that was located in the lower "yard" so the window could be used to repair another vehicle. After claimant removed the window, he began walking on a cement driveway with his toolbox in his right hand and the window in his left hand. Claimant stepped around a hole into another hole and broke his fall with his toolbox. Claimant indicated he fell to the ground and felt pain in his right leg.

Claimant laid on the ground for 10 minutes due to the pain, then got up and took the window to the service department. He testified he then reported the accident to his supervisor, John Deere. Mr. Deere asked claimant to work the rest of the day and the claimant complied. The claimant was off work the next two days, but did not testify as to the reason he was off work. Claimant alleges that a few days after the accident claimant asked Mr. Deere for medical treatment and asked if respondent had insurance or workers compensation. Claimant wanted to seek treatment for his leg at a hospital. Claimant was told by Mr. Deere to seek treatment at a hospital and to bring him documentation of the appointment.

Claimant went to the University of Kansas Hospital (KU) on August 19, 2010, for treatment. X-rays were taken of claimant's right ankle and claimant did not have an acute fracture. Old 3rd-5th metatarsal fracture deformities were noted. Claimant was restricted to light duty for seven days, was given an air splint for support, and was prescribed Naproxen and Hydrochlorothiazide. The medical report from KU indicates claimant twisted his ankle when he fell into a hole, but does not state claimant's injury occurred at work.

Claimant testified that he previously broke his right ankle in 1978, when he was eight years old. While in prison in 2006, claimant broke bones on the top of his right foot when he slipped on soap in the shower. After claimant broke his foot in prison, it took him six months to get treatment. Since then claimant has experienced "A little bit of swelling and pain,"[3] in his right foot. However, claimant indicated his current symptoms are different from those he has from his 2006 injury. Upon cross-examination, claimant admitted that when he started working for respondent, he had swelling in his right ankle and lower leg that he attributed to poor circulation.

Claimant then took documents provided by KU and gave them to Mr. Deere. Mr. Deere looked at the documents and told claimant to go back to work, which he did. Claimant continued to work, but the pain and swelling in his right ankle increased. Claimant worked for respondent until he was discharged on August 26, 2010. According to claimant, he was discharged due to poor work performance. Claimant readily admits that his work performance deteriorated, but contends it was due to his right ankle injury.

[3] P.H. Trans. at 27.

Claimant went to the Truman Medical Center (Truman) emergency room on September 12, 2010, because of right leg pain and swelling. He underwent color-flow Doppler and B-mode imaging of the right lower extremity, which revealed a new comminuted medial malleolus fracture with adjacent diffuse soft tissue swelling. There was also evidence of severe degenerative changes of the tarsal metatarsal articulations particularly of the third, fourth and fifth digits. Claimant had his right leg splinted and was given crutches to use.

Records from claimant's September 12, 2010, visit to Truman indicate claimant was injured three weeks earlier when he was stepping out of a van. Claimant initially testified he had no idea what that was about. However, upon cross-examination, claimant admitted he fell while stepping out of a van "a while back," but did not injure himself. Claimant testified he fell out of the van two years earlier and injured his shoulder.[4] Claimant then indicated Truman personnel must have gotten this wrong. Claimant did tell personnel at Truman that he broke his foot in 2006 and has had problems with his right foot since then.

Claimant again sought treatment from Truman on October 19, 2010, because of worsening right ankle pain. On this visit, claimant told Truman personnel that he inverted his ankle while stepping in a hole. A boot was placed on claimant's foot and he was referred to an orthopedic physician. The reports from claimant's two visits to Truman do not indicate claimant was injured at work.

Dr. George G. Robinson, II, an orthopedic specialist, saw claimant on November 1, 2010. Dr. Robinson was told by claimant that he injured his right ankle on August 17, 2010, when he stepped in a hole at work. Dr. Robinson reviewed x-rays of claimant's right ankle from KU taken on August 19, 2010; from Truman taken on September 12, 2010; and from Truman taken on October 19, 2010. He also took a medical history from claimant and physically examined claimant. Dr. Robinson indicates the x-rays taken on August 19, 2010, have no signs of fractures that are visible in the later x-rays. Dr. Robinson was also aware of claimant's right ankle injury in the 1970s. However, Dr. Robinson's report does not indicate he knew of the 2006 foot injury claimant suffered while in prison, or that claimant told Truman personnel on September 12, 2010, he got injured when he fell from a van. Claimant told Dr. Robinson that his family has a history of diabetes mellitus.

Dr. Robinson diagnosed claimant with right ankle Charcot arthropathy, predicated by an ankle sprain at work on August 17, 2010. However, he specifically stated in his report, "The causation of this is relatively difficult. He wouldn't get Charcot arthropathy without what I feel is to be underlying neuropathy. Also, however, in the absence of this injury, he likely would not have developed Charcot arthropathy to begin with."[5]

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[4] *Id.*, at 35-36.

[5] *Id.*, Cl. Ex. 1.

Mr. Deere denied claimant told him about the accident on the date of the alleged incident and denied he had a conversation with claimant concerning medical treatment. He first learned of claimant's accident from Kristi Britt, who worked in respondent's office. Ms. Britt told Mr. Deere claimant was injured and was claiming workers compensation. Mr. Deere denied knowing about a letter sent by claimant's counsel to respondent apparently giving notice of the accident. The parties did not place a letter from claimant's counsel in evidence and, therefore, the date respondent received the letter is unknown.

Mr. Deere indicated that he was hired on July 6, 2010, and claimant was hired before Mr. Deere began working for respondent. Before August 17, 2010, he observed claimant wearing an apparatus on his right ankle and using a cane at work. Mr. Deere was told by claimant that he wore the apparatus because his ankle would swell up due to diabetes. Mr. Deere denies authorizing medical treatment for claimant or knowing claimant sought medical treatment in August and September 2010.

According to Mr. Deere, claimant was discharged to cut expenses and his termination had nothing to do with claimant's right ankle problems. Mr. Deere indicated that when he discharged claimant, claimant indicated he was going to give his resignation anyway to take another job. Claimant did go to work at Midwest Auto Group for a week.

William Brian McMullen, a former employee of respondent, testified that he worked for respondent during August 2010 and was employed by respondent until December 2010. While at work, Mr. McMullen observed claimant wearing an apparatus on his right ankle and using a cane prior to August 17, 2010. Mr. McMullen believes the respondent first learned of the accident when it received papers that had apparently been filed by claimant or his counsel. Mr. McMullen testified he recalls being shown the papers by the owner of respondent. Prior to respondent receiving the aforementioned papers, Mr. McMullen was unaware of claimant's injury. Mr. McMullen indicates claimant was discharged on September 2, 2010, because respondent had decided to outsource vehicle detailing.

Mr. Deere indicated that he did not authorize claimant to remove the window and had no knowledge that claimant had done so. Mr. McMullen testified he would not have directed claimant to remove the window as claimant was an auto detailer, not a mechanic. Respondent's counsel argues claimant's allegation that he injured himself while carrying the window is unsupported by the evidence as claimant was not authorized to remove the window and also had no experience removing windows.

Does the Board have jurisdiction to review that part of the Preliminary Decision wherein the ALJ appointed a physician to evaluate claimant?

From the following language in the preliminary order, this Board Member concludes the ALJ was uncertain about the causation of claimant's right ankle injury:

> After consideration of the evidence presented to the court, especially the reports generated by respondent's expert, Dr. Robinson, it is clear to the court that claimant did suffer from a pre-existing condition. Dr. Robinson states that:
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> > ". . . The causation of this is relatively difficult. He wouldn't get Charcot arthropathy without what I fell *[sic]* is to be underlying neuropathy. Also, however, in the absence of this injury, he likely would not have developed Charcot arthropathy to begin with. . . ."
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> The doctor also noted that there was some early medial calcification indicating recent healing. Dr. Robinson did recommend a second medical opinion with a foot and ankle orthopedist and the court agrees. . . .[6]

In the preliminary order, the ALJ did not order medical treatment and indicated she was holding the issue of temporary total disability in abeyance until after she received the IME report. Nor did the ALJ make a finding as to whether claimant met with personal injury by accident arising out of and in the course of his employment. Accordingly, this Board Member finds Dr. Horton was ordered to examine claimant to assist the ALJ in determining causation.

Respondent asserts the ALJ's preliminary order found that claimant suffered a personal injury arising out of and in the course of his employment and that claimant gave proper notice of the accident. The brief of respondent's counsel contends the Board has jurisdiction to review these issues. Respondent did not allege the ALJ exceeded her jurisdiction by appointing Dr. Horton to evaluate claimant. The brief submitted by claimant's counsel does not address jurisdiction.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2010 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or

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[6] ALJ Preliminary Decision (March 31, 2011) at 1-2.

> temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In its brief, respondent asserts the Board has jurisdiction to hear and decide this matter. Claimant did not contest jurisdiction. However, the right to appeal is statutory.[7] When the record reveals lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[8] Ordinarily, parties cannot consent, waive, or confer jurisdiction on a court.[9]

After reviewing the record compiled to date, the undersigned Board Member concludes that K.S.A. 44-534a(a)(2) does not give the Board jurisdiction to review the ALJ's order appointing Dr. Horton to examine claimant. Therefore, the ALJ's appointment of Dr. Horton (or another appropriate orthopedic physician) to examine claimant should remain in full force and effect and the appeal by respondent on that issue is dismissed.

Did the claimant's right ankle injury arise out of and in the course of his employment?

There is no specific finding in the preliminary order by the ALJ that claimant's injury arose out of and in the course of his employment. The apparent purpose of appointing Dr. Horton, or in the alternative another orthopedic doctor specializing in ankles/legs, was to provide an opinion concerning causation of claimant's right ankle injury. Therefore, this Board Member finds respondent's appeal of this issue is premature, as the ALJ has not determined that claimant suffered a personal injury arising out of and in the course of his employment.

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[7] *Resolution Trust Corp. v. Bopp*, 251 Kan. 539, 541, 836 P.2d 1142 (1992).

[8] *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[9] *In re Marriage of Harris*, 20 Kan. App. 2d 50, 58, 883 P.2d 785, *rev. denied* 256 Kan. 995 (1994).

Did claimant give timely notice as required by statute?

Claimant indicated he injured himself in an accident which occurred on August 17, 2010, give or take two days. On August 19, 2010, claimant sought medical treatment from KU. August 19, 2010, medical records from KU indicate the incident occurred "more than 2 days ago."[10] Claimant's Application for Hearing alleges an accident date of August 17, 2010. Respondent does not suggest an alternate accident date, but asserts claimant's injury did not arise out of and in the course of his employment. The evidence in the record leads this Board Member to conclude the date of claimant's accident was August 17, 2010.

Claimant alleges he gave notice to respondent on the day of the accident, but respondent counters that it did not receive notice of the accident until after claimant was discharged on September 2, 2010. The ALJ found, "Given the conflicting testimony of the witnesses and the complexity of the injury itself, the court finds that just cause existed to extend statutory notice to 75 days under K.S.A. 44-520."[11] Impliedly, the ALJ found claimant did not give notice within 10 days after the accident, but did give notice within 75 days after the accident. The ALJ made no finding as to the specific date claimant notified respondent of the accident, or the manner in which claimant gave notice to respondent.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more

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[10] P.H. Trans., Resp. Ex. C.

[11] ALJ Preliminary Decision (March 31, 2011) at 2.

probably true than not true on the basis of the whole record."[12] Claimant's supervisor, Mr. Deere, indicated claimant never told him about the accident. Mr. McMullen, another employee of respondent, corroborated the testimony of Mr. Deere.

Claimant alleged that he gave Mr. Deere notice of the accident on the same day it occurred. Mr. Deere steadfastly asserted he had no knowledge of the accident until after claimant was discharged. Claimant's testimony concerning notice has been consistent. The record reflects claimant told his employer of the accident on the day it occurred. After returning to work, he continued to have pain and asked for medical treatment. Therefore, this Board Member finds claimant gave notice of the accident within 10 days after it occurred as required by K.S.A. 44-520. Accordingly, there was no reason for the ALJ to extend the notice period to 75 days.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

WHEREFORE, the undersigned Board Member affirms in part and reverses as follows the March 31, 2011, Preliminary Decision entered by ALJ Yates Roberts:

For lack of jurisdiction, the Board dismisses respondent's appeal on the issue of whether the ALJ erred in ordering claimant to undergo an IME for causation.

The Board will not review whether claimant suffered personal injury by accident that arose out of and in the course of his employment because it would be premature to do so.

The Board finds claimant gave respondent timely notice of the accident.

IT IS SO ORDERED.

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[12] K.S.A. 2010 Supp. 44-508(g)

[13] K.S.A. 44-534a.

[14] K.S.A. 2010 Supp. 44-555c(k).

Dated this ____ day of June, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge